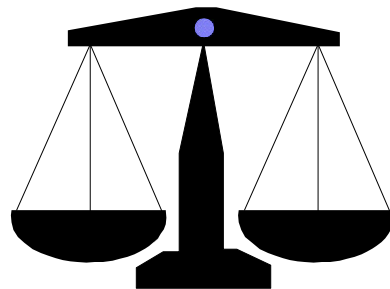


**K.C.M.B.A.**

**INN OF COURT PROGRAM**

**October 4, 2007**

**DISCOVERY:  
STRATEGY & TACTICS**



**John Kurtz**  
**Hubbard & Kurtz, L.L.P.**  
**1718 Walnut**  
**Kansas City, Missouri 64108**  
**(816) 472 HOPE**  
**(816) 472 KING (Fax)**  
**[jkurtz@MoKanLaw.com](mailto:jkurtz@MoKanLaw.com)**  
**[www.MoKanLaw.com](http://www.MoKanLaw.com)**

# **DISCOVERY: STRATEGY & TACTICS**

## **CONTENTS**

<b>I. Expedition of Litigation</b>	<b>.....Page 3</b>
<b>II. When and how to use interrogatories, requests for admissions, subpoenas duces tecum, and depositions</b>	<b>.....Page 4</b>
<b>III. When to take witness's statements, under oath or otherwise, and the disclosure requirements for such statements</b>	<b>.....Page 28</b>
<b>IV. When to take video depositions – Are they just for trial?</b>	<b>.....Page 30</b>
<b>V. Pulling everything together for trial</b>	<b>.....Page 31</b>

# **I. EXPEDITION OF LITIGATION**

- a. Interaction with opposing counsel can accelerate or impede.**
- b. Case management consideration.**
- c. Benefits for all concerned.**
- d. Judicial cooperation.**

## **II. WHEN AND HOW TO USE INTERROGATORIES, REQUESTS FOR ADMISSIONS, SUBPOENAS DUCES TECUM, AND DEPOSITIONS**

### **Interrogatories**

- a. Proper use for only basic facts where lawyers do not create the answer.
- b. Send 2<sup>nd</sup>, 3<sup>rd</sup>, etc. sets right after depositions.
- c. Use interrogatories for missing links.
- d. Do not use interrogatories where the opposing lawyer thereby gets 30 days to divine the perfect answer. Save many detailed questions for depositions.
- e. Do not fear asking to send more than the original limit. Chance to familiarize the judge with case.

### **Interrogatories and Requests for Admission**

The Federal Rules of Civil Procedure do not prohibit joining a request for admission with an immediately following interrogatory requesting a specific factual and legal basis for any denial. When a lawyer examines the opponent's responsive pleadings, she or he can carefully analyze those pleadings and prepare a complete outline of all the factual and legal matters at issue in the case. That outline can then be used to prepare joint requests for admissions and interrogatories, seeking an admission concerning a particular matter with an immediate follow-up interrogatory that seeks appropriate information if the request is denied. Here is a sample of how this can work:

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MISSOURI**

**PLAINTIFFS' FIRST INTERROGATORIES AND FIRST REQUEST FOR  
ADMISSION TO DEFENDANT**

**COMES NOW** plaintiffs, by and through their attorneys of record, pursuant to Rules 33 and 36 of the Federal Rules of Civil Procedure, and propound the following discovery to defendants, both the interrogatories and requests for admission.

**INSTRUCTIONS FOR ANSWERING**

**Full Answers**

Please note that all answers are to be made separately and fully and that an incomplete or evasive answer is a failure to answer. Where an interrogatory calls for an answer in more than one part, please separate the parts in your answer accordingly so that each part is clearly set out and understandable.

**Knowledge of Agents and Others**

Where your knowledge or information in your possession is requested, such request includes knowledge or information in possession of your representatives, employees, agents, independent contractors, insurers, and unless privileged, your attorneys.

**Incomplete Knowledge**

If you have only incomplete knowledge of the answer to an interrogatory, please answer to the extent of your knowledge and state specifically what part

or area of the interrogatory you have only incomplete knowledge of and identify the person(s) who does or might have additional knowledge or information to complete the answer.

### **Documents**

You may answer any interrogatory in whole or in part by attaching a document(s) which contains information sufficient to do so. Such document(s) may, if authenticated, be a copy of the original. Any document(s) used to answer an interrogatory may contain other information as well; however, the relevant portion of that document(s) must be so marked or indexed.

### **Identification of Person With Knowledge**

For each interrogatory, please identify the person(s) from whom the information contained in the answer is obtained and the person(s) who swear to the truth of that information.

### **Duty to Supplement**

Please note that, pursuant to Fed. R. Civ. P. 26(e), you are under a continuing duty to supplement your responses.

**[Note: The first 3 requests emphasize the duty to respond fully.]**

1. Admit that FRCP 36(a) provides that requests for admission may be served regarding “the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact....”

2. Admit that FRCP 37(c)(2) provides that, “If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney’s fees.”

3. Admit that you are “under a duty to supplement or correct the disclosure or response to include information” acquired after the original response in accordance with the terms of FRCP 26 (e).

4. **[example of “statements...of fact” per FRCP 36(a)]** Defendant First Response, Inc.’s July 20, 1998 “proposal” committed that “a preliminary, on-site security assessment” would be “accomplished” [FR0 1212] and that “Safety...Training and Supervision” would be covered, specifically committing that, “We cover the importance of safety aspects of the security officer’s daily functions as they apply to your facility.” [FR0 1205].

5. **[This is the interrogatory following the request for admission.]**  
If the answer to the immediately preceding request for admission is anything other than a complete affirmation, identify with particularity the factual and legal basis for your denial, including the name, home and business address, and telephone number of every person having first-hand knowledge of any portion of the facts or law; specify the substance of the facts or law that you or

your attorney may seek to elicit from those persons and how those persons gained the information regarding those facts or law; and identify the contents of any written materials or computer data relied on in support of your denial (or attach copies to your answers to these discovery requests). If you are unable to admit or deny the request, identify all the information that you have available in your answer to this discovery request and specify why you cannot admit or deny the previous request for admission.

6. **[example of “opinions of fact” per FRCP 36(a)]** On June 9, 2000, Armour-Swift-Eckrich Human Resources Manager Paul Willman expressed in writing to defendant First Response, Inc. his opinion that, “...the quality of your service in general is not satisfactory....”

7. **[Copy & paste here the same interrogatory as in paragraph 5.]**

8. **[example of “application of law to fact” per FRCP 36(a)]**

Defendant First Response, Inc.’s employees acted within the course and scope of their employment by defendant First Response, Inc.

9. **[Copy & paste here the same interrogatory as in paragraph 5]**



## TEN DO'S OF PREPARING FOR DEPOSITIONS

1. **Start Early.** It is best to begin deposition preparation as early as possible so that you will have time to reflect upon it, revise it, and perfect it.
2. **Complete Paperwork Discovery First.** The deposition will be better if all, or as much as possible of, the paperwork discovery is done prior to the deposition. Many questions will arise from the documents and interrogatory responses.
3. **Work Around Your Theme.** A good trial lawyer has a theme which will run from voir dire through closing argument in the trial. Questions should be framed so as to test and sound that theme even in deposition preparation.
4. **Consult the Jury Instructions.** Be certain about the elements of your case and that your prepared deposition questions address those elements.
5. **Make Yourself An Expert in the Area.** If the subject of the deposition will be a technical matter, get to the library and into the literature so as to educate yourself and make yourself (as much as possible) an instant expert in the specialized area.
6. **Research the Deponent.** Learn everything you can about the deponent and his or her background in advance of the deposition so that you will know who you are dealing with and will know best how to approach them.
7. **Be Organized.** Careful organization in advance of the deposition includes organization of areas for questioning and documents for review. This will give the questioner greater confidence during the deposition.
8. **Spend Time With Your Client.** If your client is the deponent, invest a lot of time in deposition preparation so that the client's comfort is maximized. Failure to invest that time can be fatal to the entire case.
9. **Use Checklists.** Develop and use checklists for routine depositions such as treating physicians, automobile drivers, and the like.
10. **Try to Go First.** As a general rule, it is best to take the other side's deposition first. If they have acquired some right to go first, suggest that the depositions be taken on the same day (back-to-back).

## TEN DON'TS OF PREPARING FOR DEPOSITIONS

1. **DON'T Depose Everyone.** Try to limit the depositions to critical witnesses whose testimony you absolutely need to obtain by way of deposition. If there are others for whom you have written documents or alternative methods of locking them into certain testimony at trial, consider not deposing them.
2. **DON'T Waste Time Developing in Useless Questions.** Instead of the shotgun deposition, try to prepare to take a deposition by means of a rifle with a high power scope.
3. **DON'T Sweat the Small Stuff.** Life is too short to get tremendously wrapped up in which court reporter or whose office is used. Try not to make goal line stands on actually unimportant issues.
4. **DON'T Plan Time Poorly.** Be certain to start at an hour that will allow you to do the questioning you need to do. Also, try to avoid setting any appointments which may cause the foreshortening of questions that need to be asked.
5. **DON'T Postpone Meeting with Client or Witness.** Because of such things as human tardiness, automobile collisions, bad weather, and the like, it is a mistake to schedule the deposition preparation session for the same day as the deposition. If that meeting is scheduled in advance, all timing difficulties can be accommodated.
6. **DON'T Ignore the Client's Questions.** The client should be given the opportunity to contribute to the questions and be certain that the questions in their mind will be answered by the deposition.
7. **DON'T Forget the Experts.** If this is a case where there will be an expert involved, it is usually good to consult the expert for the purpose of getting that person's thoughts about what topics should be covered in a deposition and how.
8. **DON'T Avoid Hard Questions to the Client.** If your client is the deponent, part of the preparation must include the asking of all possible hard questions, even if they may offend the client. They should be asked in preparation so that the client has the opportunity to think about them before the actual deposition.
9. **DON'T Ignore Chances for Rapport.** The totally intimidated deponent is very often a totally uncooperative deponent. Therefore, try to do things to create rapport with the deponent.
10. **DON'T Ask Everything.** Certain questions are better asked at trial. If every single, imaginable question is asked at the deposition, the opponent will be fully prepared with every single, imaginable answer at the trial.

## **Affidavits**

- a. Avoid records custodian depositions.**
- b.**
- c. Be familiar with statutes authorizing usage of affidavits at trial.**
- d.**
- e. Consider using affidavits in conjunction with requests for admission.**

## **Requests for Admission**

- a. A tremendous, but under-used tool.**
- b. Use them to narrow the issues.**
- c. Use terms from jury instructions.**
- d. Insert a reminder about the rule's provisions for fees and costs for a denial that is later overcome.**

# **AUTO COLLISION DEPOSITION**

## **Personal History**

- A. Name?
- B. Age?
- C. Address?
- D. Previous Addresses?
- E. Married?
  - 1. When?
  - 2. Where?
- F. Children?
- G. Driver's License; restrictions; eyesight or hearing problems?
- H. Present Employers?
  - 1. Duties?
  - 2. Wages?
  - 3. Supervisor?
  - 4. Time?
  - 5. Raises?
- I. Past Employers?
- J. Criminal Convictions?
- K. Aliases?
- L. Education?
- M. Military?
- N. Insurance?            Cars?
- O. Prior depositions? Prior lawsuits?

## **Prior Illnesses and Injuries (for Plaintiffs)**

A. Prior lawsuits?

When and how?  
Doctors?  
Lawyers?  
Injuries?  
Settlement?  
Permanent?  
Parties involved?

B. Prior claims?

Injuries?  
Permanent?  
When and how?  
Doctors?  
Lawyer?  
Parties?  
Settlement?

C. Prior Compensation claims?

Injuries?  
Permanent?  
When and how?  
Doctors?  
Lawyers?  
Parties?  
Settlement?

D. Prior Hospitalization?

When?  
For what?  
Doctors treating?  
Recovery?

E. Prior Illnesses?

What?  
Doctors treating:  
Recovery?

F. Prior accidents?

When and how?  
Doctors treating?  
Recovery?

G. Prior condition of health?

H. Subsequent accidents and illnesses?

### **III. Facts**

A. Day?

Date?  
Time?  
Weather conditions?

**B. Where going?**

C. Where been?

D. Who with?

E. Drinking? Drugs? Medication? Health that day?

F. Street widths?

G. Visibility? Obstructions? Vantage point/where were you?

H. Topography? Road conditions?

I. Condition of car?

Brakes  
Steering?  
Horn?  
Tires?  
Windshield

J. Direction going?

K. Speed?

L. Speed limit?

M. First saw other car (s)? Glasses? Vision problems?

- N. Traffic controls?
- O. Cars' speed and location and direction?
- P. What vehicles did?
  - Signal?
  - Swerve?
  - Honk?
  - Slow?
  - Stop?
  - Speed up?
  - Lights?
- Q. Warning by passengers?
- R. Skid marks by both cars?
- S. Where debris?
- T. Parts colliding?
- U. Where impact on road?
- V. Distance traveled after impact?
- W. Directions moved after impact?
- U. Parts of car damaged?
- X. Seat belts?
- Z. What persons did after collision?

#### **IV. Witnesses & Statements**

- A. All statement by parties involved?
- B. All statements by witnesses?
- C. Names and addresses of witnesses? Acquaintances?
- D. Photographs?
  - At scene
  - After?
- E. Police called? What police did or said?
- F. Guilty plea in police court?

## **V. Injuries & Medical Bills (for Plaintiffs)**

- A. First noticed pain?
- B. Complain to police?
- C. Strike anything in car?
- D. First to doctor?
  - All treatments?
  - Why to this doctor?
- E. All of doctors who examined or treated?
  - For what?
  - Number of times?
  - Their bills?
- F. Hospitalized?
  - When and where?
  - For what?
  - How long?
  - Type treatment?
  - Bill?
  - Number of times?
  - Doctor treating?

## **Physical Health Now (for Plaintiffs)**

<b>All Complaints</b>
-----------------------

How often?  
Improved?  
Prior trouble --- whether caused by injury or not?  
Where pain located?  
Black, blue marks, cuts, bumps and bruises?  
Braces?  
Supports?  
Collars?  
Crutches?  
Wheelchair?  
Bedridden?  
Prescriptions – still taking – cost?  
Limitations?



Things you can no longer do; work & leisure?

**Loss of Earning (for Plaintiffs)**

- A. How long off continuously?
- B. Last time missed?
- C. How often in between?**

**Car Damages**

- A. Where repaired?
- B. Costs
- C. Still driving?
- D. Driveable following accidents

# **DEPOSITION OF MECHANICAL ENGINEER**

## **1. BACKGROUND INFORMATION**

## **2. EDUCATION**

- A. School Accredited
- B. Specialty
- C. Certification
- D. Specialized Academic Experiences

## **3. ASSOCIATION AND AFFILIATION**

## **4. SPECIALTY AND SUB-SPECIALTY**

- A. Training
- B. Research
- C. Publication
- D. Teaching
- E. Speaking

## **5. EXPERIENCE WITH PRODUCTS**

- A. Areas of Experience
  - I. Design
  - II. Manufacture
  - III. Inspection
  - IV. Testing
  - V. Distribution
  - VI. Sales
- B. Experience with Accidents or Injuries

## **6. RESEARCH**

## **7. SCHOLARLY OR PROFESSIONAL ARTICLES AND WRITINGS**

**8. PAST EXPERIENCE AS AN EXPERT WITNESS**

- A. Depositions
- B. Court Appearance
- C. Income
- D. Expert for Plaintiffs
- E. Relationship to Parties and Counsel
- F. Ever Challenged
- G. Ever Refuse the Right to Testify

**9. COMPENSATION**

**10. INTRODUCTION TO FACTS**

Source of Information  
Content of Information Received  
Documents Reviewed

**11. TREATISES, BOOKS AND ARTICLES READ IN PREPARATION FOR TESTIMONY**

**12. OTHER INDIVIDUALS CONSULTED IN PREPARATION FOR TESTIMONY**

**13. EXPERT'S ASSESSMENT OF THE PRODUCT**

- A. Describe It
- B. Compare to Similar Products
- C. Conformity to Industry and Government Standards
- D. History of the Product
- E. Design of the Product
  - I. Persons Involved
  - II. Records
  - III. Design Specifications

**14. SAFETY DEVICES**

- A. Locks

- B. Catches
- C. Automatic Triggering Devices
- D. Fail-safe Switches
- E. Monitoring Devices
- F. Safety Valves
- G. Others

15. **SUBCONTRACTORS AND MANUFACTURING PROCESS**

16. **QUALITY CONTROL OF MANUFACTURING PROCESS**

17. **WARNING ON PRODUCT**

18. **WARRANTIES AND DISCLAIMERS BY MANUFACTURER**

19. **INSPECTION PROCESS**

20. **OPINIONS ABOUT MANUFACTURING PROCESS**

21. **ASSESSMENT OF USE OF PRODUCT**

22. **EXAMINATION OF PRODUCT AFTER INJURY (STEP-BY-STEP)**

- A. Physical Evidence Examined
- B. Tests Performed
- C. Conclusions Drawn from Inspection
- D. Theories About Product Defects or Failure

23. **DESCRIPTION OF HOW ACCIDENT OR INJURY OCCURRED**

- A. Give Opinion About Mechanism of Failure or Defect in Product
- B. Give Opinion About Timing
- C. Give Opinion About Sequence of Events Prior to Accident or Injury
- D. Basis of Opinions
  - I. Whether Relied on Texts
  - II. Whether Relied on Consultation with Others

- III. Whether Relied on Past Experience with Similar Products
- IV. Whether Relied on Past Experience with Same Problems
- V. Whether Ever Held Contrary Beliefs

- 24. TESTS OR EXPERIMENTS WHICH EXPERT RELIED ON IN FORMING OPINIONS AND THEORIES ABOUT PRODUCTS, INJURY
- 25. STATE ANY OPINIONS ABOUT ALTERATION OF PRODUCT
- 26. OPINIONS ABOUT CAUSAL CONNECTION BETWEEN PRODUCT FAILURE AND INJURY

# DEPOSITION OF MEDICAL EXPERT

## Background

1. Name and residence address.
2. Occupation?
3. Are you licensed as a practicing physician in any state?
4. When did you obtain your license?
5. Do you maintain an office in \_\_\_\_\_? And what is the address of that office?
6. Do you see patients at that address on a current basis?
7. How long have you been practicing your profession?
8. Are you still active?
9. Have you ever practiced in any states other than \_\_\_\_\_?
10. Where did you receive your formal education for the practice of medicine?
11. Where did you do your internship?
12. What does an internship entail?
13. Can you briefly describe your training in \_\_\_\_\_?
14. Have you specialized?
15. What is your specialty? Could you define \_\_\_\_\_? (specialty).
16. How long have you practiced in that specialty?

17. Do you concentrate your practice on any part of the body more than other parts of the body?
18. Are you on the staff of any medical facilities?
19. Have you ever had an occasion to teach in the medical field?
20. Have you ever done research that led to the publication of medical articles?
21. Are you a member of any professional associations? And if so, tell us what they are and represent.
22. Are there any other professional organizations of which you a member?
23. Are you board certified?
24. What does "board certified" mean?
25. Does this involve experience in testing beyond that which you would receive as a medical doctor or which is necessary to obtain a license to practice medicine in the state?
26. Is there any higher designation within a specialty in the medical field other than board certification?
27. Are you board certified in any other field?

### **Treatment of Plaintiff**

28. During the course of your practice have you occasion to observe and treat (illness or injury)?
29. Can you assign a percentage to that part of your practice devoted to treating \_\_\_\_\_?
30. Have you ever had occasion to see and/or treat (name) \_\_\_\_\_?
31. In the course of your practice, have you generated records on \_\_\_\_\_?
32. Do you have those records before you today? (Mark as Exhibit "")

33. Are these records generated or reviewed by you in the ordinary course of your business as a physician?
34. Were the entries that were recorded in these records made at or approximately near the time of the events reflected therein?
35. When and where did you first meet \_\_\_\_\_?
36. What medical history did \_\_\_\_\_ give you at that time?
37. What complaints did \_\_\_\_\_ make to you at that time?
38. Did you make a personal physical examination of \_\_\_\_\_?
39. Would you list your physical findings?
40. Make sure that the physician defines in layman's terms each and every medical term, no matter how obvious the meaning may appear to be.
41. After your examination was completed, was \_\_\_\_\_ referred to the x-ray department and x-rays taken?
42. Could you make any determination from the x-rays?
43. Were there other findings made as a result of the tests or examinations of \_\_\_\_\_ on his/her initial visit to you?
44. Can you describe what treatment was initiated by you or under your instruction?

### **Surgery**

45. Was it necessary to perform any type of operation? And if so, when and by whom and for what reason?
46. Are there any risks or dangers in inducing someone to sleep with general anesthesia? If so, what is that risk?
47. Was \_\_\_\_\_ made aware of that risk?



48. Can you describe what the operation involved?
49. What were the goals of the operation and were those goals achieved?
50. What recovery period involved?
51. What limitations did \_\_\_\_\_ suffer as a result of the operation?
52. Did you see him/her after the occasion of the surgery? And if so, read into evidence the dates of the visit she/he had to your office. And if you have not covered any significant findings associated with these dates, please feel free to do so at that time.
53. What were his/her complaints at these times?

#### **IV. Consultation**

54. At any time did you feel it necessary to obtain a consultation with another physician? And if so, when and for what problem?
55. Was the diagnosis made by the consulting physician? If so, what was it?
56. Did you concur with that diagnosis?
57. Is this consistent with your findings? What were those findings?

#### **V. Limitations**

58. (Be sure that the physician quantifies all limitations or deviations in movement).
59. Are all of the complaints made by \_\_\_\_\_ related back to the original injury?
60. (Be sure that the physician describes in particular detail any and all peculiar tools, instruments, braces or other medical devices used in treating the patient and state the period of time for the use of any braces and the manner in which the braces, tools, etc. were used or applied.)

61. (Be sure to discuss the practical effect and pain involved and any symptoms related by the doctor in the discussion of his/her findings or in the discussion of the complaints made by the patient).

## **VI. Causation**

62. Do you have an opinion to a reasonable degree of medical certainty as to whether \_\_\_\_\_ symptoms were related to the injuries for which you began treating \_\_\_\_\_ on \_\_\_\_\_ date.
63. What is the basis for that belief?
64. Doctor, I want you to assume a number of facts as true and if on the basis of these assumptions you can form an opinion to a reasonable degree of medical certainty, I want to ask your opinion concerning them. Do you understand?
65. (Do not place any facts in the hypothetical which you are not absolutely certain will be proven at trial.)
66. Doctors, assuming these facts are true, and taking into consideration the findings to which you have previously testified during this deposition, do you have an opinion to a reasonable degree of medical certainty as to what caused the injuries which you have related?

## **VII. Permanency**

67. Do you have an opinion to a reasonable degree of medical certainty as to whether any of the injuries are permanent?
68. Can you tell me which particular injuries are permanent and when you say permanent do you mean for the rest of the patient's natural life?
69. Will the patient experience pain for the rest of his or her natural life?
70. Has the patient become more susceptible to other forms of illnesses (such as osteoarthritis, etc.)?

71. Does the patient have any scarring, and if so, please describe the same?
72. Do you have an opinion to a reasonable degree of medical certainty, assuming all of the facts that I've given you and based upon your findings, as to whether or not any future expense or medical treatment will have to be undertaken for the conditions which you have previously described?
73. Will this involve hospitalization?
74. Approximately what would this cost in today's money?

### **VIII. Records and Bills**

75. (Stipulate as to records and bills and if not stipulation is made, show the reasonableness and necessity of the bills charged by this physician).

### **III. WHEN TO TAKE WITNESSES' STATEMENTS, UNDER OATH OR OTHERWISE, AND THE DISCLOSURE REQUIREMENT FOR SUCH STATEMENTS**

#### **Depositions v. Interviews**

- a Recent rulings make ex parte interviews more possible.**
- b. Supplement with summary for signature, audiotape, videotape. Go to the scene.**
- c. As to opposing witnesses, try to gather information for cross-examination even without deposition.**
- d. Some of the best cross-examination can come with the un-deposed witness.**

#### **Disclosure Requirements**

**The rule regarding discovery of statements generally is FRCP 26(b)(3) ---**

**"(3) Trial Preparation: Materials.** Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been

made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of [Rule 37\(a\)\(4\)](#) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded."

### **Here is some Eighth Circuit case law that discusses the general parameters of discovery regarding attorney's notes of interviews and also statements of witnesses:**

" There are two kinds of work product-ordinary work product and opinion work product. Ordinary work product includes raw factual information. See [Gundacker v. Unisys Corp.](#), 151 F.3d 842, 848 n. 4 (8th Cir.1998). Opinion work product includes counsel's mental impressions, conclusions, opinions or legal theories. See *id.* at n. 5. Ordinary work product is not discoverable unless the party seeking discovery has a substantial need for the materials and the party cannot obtain the substantial equivalent of the materials by other means. See [Fed.R.Civ.P. 26\(b\)\(3\)](#). In contrast, opinion work product enjoys almost absolute immunity and can be discovered only in very rare and extraordinary circumstances, such as when the material demonstrates that an attorney engaged in illegal conduct or fraud. See [In re Murphy](#), 560 F.2d 326, 336 (8th Cir.1977)

. . . . .  
Notes and memoranda of an attorney, or an attorney's agent, from a witness interview are opinion work product entitled to almost absolute immunity. See [In re Grand Jury Proceedings](#), 473 F.2d 840, 848 (8th Cir.1973) (attorney's personal recollections, notes and memoranda from interviews are absolutely protected work product); see also [Upjohn Co. v. United States](#), 449 U.S. 383, 399-400, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) ( "[f]orcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes"). Attorney notes reveal an attorney's legal conclusions because, when taking notes, an attorney often focuses on those facts that she deems legally significant. In this way, attorney notes are akin to an attorney's determination as to which documents are important to a case-the latter being something we have also held to be protected work product. See [Petersen v. Douglas County Bank & Trust Co.](#), 967 F.2d 1186, 1189 (8th Cir.1992). . . .

In addition, even if we were to assume the documents were ordinary work product, the Bakers have not shown a substantial need for the documents and that the substantial equivalent of the information cannot be procured by other means. Discovery of a witness statement to an attorney is generally not allowed if that witness is available to the other party. See [In re Grand Jury Proceedings](#), 473 F.2d at 849. A party also does not demonstrate substantial need when it merely seeks corroborative evidence. See [Director, Office of Thrift Supervision v. Vinson & Elkins, LLP](#), 124 F.3d 1304, 1308 (D.C.Cir.1997) (no substantial need when documents sought would merely reinforce known inconsistencies)."

**[Baker v. General Motors Corp.](#), 209 F.3d 1051, 1054 (8<sup>th</sup> Cir. 2000).**

## **IV. WHEN TO TAKE VIDEO DEPOSITIONS - ARE THEY JUST FOR TRIAL?**

Videotape depositions can provide the following advantages for a party --- above and beyond just preserving testimony for trial. Demonstrations will be given during the session using actual videotapes of actual videotaped deposition testimony.

- Preventing unnecessarily confrontational conduct by the opposing party or counsel.....or, at least in the alternative, recording it in ways that the written word cannot.
- Recording facial expressions and body language that is at variance with the written word.
- Providing visual images for excerpting later and incorporating into a summary judgment motion or other pleadings.
- Providing visual images for excerpting later and incorporating into a mediation presentation.
- Allowing the deposing side to remember the fact and conduct of the witness in ways that the written word cannot.
- Authenticating who a person is for later viewing and verification by other witnesses who would have to see the person in order to do a positive verification of who the person was that did a certain thing.

# **V. PULLING EVERYTHING TOGETHER FOR TRIAL**

## **HAVRUM v. U.S.A. PLAINTIFF'S WITNESS LIST**

### **MONDAY**

<b><u>Witness Name</u></b>	<b><u>Very Approx. Length of Direct Examination</u></b>	<b><u>Primary, General Area of Testimony</u></b>
David Havrum Colleen Langley	25 min. 25 min.	Elzie Havrum HSTMVH & 4E
Kathy Knight	25 min.	Staff & Knowledge
Mary Wideman	25 min.	CPR Knowledge
Neva Burkey	25 min.	Morning Report Knowledge
Lisa Hall	25 min.	QA/QI & Knowledge
Joan Kollenberg	25 min.	4E & Knowledge
Dr. Timothy Vaughn	25 min.	M.D. /Knowledge
Dr. Jan Swaney [depo.]	25 min.	M.D. /Knowledge
Barbara Von Thun	25 min.	QA/QI & CPR
Linda McGary	25 min.	QA/QI & Data
Dr. Edward Adelstein	25 min.	Death Data
Cynthia Pescaglia	25 min.	4E Head Nurse

## TUESDAY

<u>Witness Name</u>	<u>Very Approx. Length of Direct Examination</u>	<u>Primary, General Area of Testimony</u>
Clayton Hayes	25 min.	R. Wms. Hiring
Dr. Gordon Christensen	60 min.	Deaths & Codes
Kathy Lee	20 min.	R. Wms. "Race Me?" Discussion
Mary Lummus	20 min.	4E
Sandi Perkins Ames	20 min.	R. Wms. & Springfield
Ruth Lintemoot	20 min.	R. Wms. & 4E deaths
Jan Pelley Porter	20 min.	R. Wms. Knowledge of Problem.
Mae Seifert	20 min.	Nursing Practices

## WEDNESDAY

Mel Rupard	20 min.	Police Call
Officer Hastings	20 min.	Police Call
Dr. Thomas Young	90 min.	Pathology
Joseph Kurzejeski	40 min.	HSTMVH, Deaths, Codes
Sue Davis	20 min.	QA/QI
Dr. Muthu Krishnan	25 min.	Death of Elzie Havrum
Vicki Batye	20 min.	Death of Elzie Havrum



<b>THURSDAY</b>
-----------------

<u><b>Witness Name</b></u>	<u><b>Very Approx. Length of Direct Examination</b></u>	<u><b>Primary, General Area of Testimony</b></u>
Dr. Dorothy Cooke	90 min.	Nursing
Rebecca Rahmoeller	35 min.	Nursing Coordinator
Catherine Wine	45 min.	4E & R. Wms.
Philip Williams	45 min.	FBI
Paul Fennewald	30 min.	FBI

<b>FRIDAY</b>
---------------

Kim Mills	40 min.	Elzie Havrum
Dale Simpson	20 min.	Elzie & Helen Havrum
Wilma Salmons	20 min.	Elzie & Helen Havrum
Melissa Williams [depo.]	25 min.	R. Wms.
Helen Havrum	45 min.	Elzie Havrum

<b>WEDNESDAY, AUGUST 5, 1998</b>
----------------------------------

Dr. Timothy Rohrig	90 min.	Toxicology
Lee Ann Nivens	20 min.	Destruction of Records